

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

SANGHAMITRA BASU,

Plaintiff(s),

v.

MASSACHUSETTS MUTUAL LIFE  
INSURANCE COMPANY,

Defendant(s).

Case No. 2:20-CV-1432 JCM (BNW)

ORDER

Presently before the court is plaintiff Sanghamitra Basu (“plaintiff”)’s motion for partial summary judgment. (ECF No. 49). Defendant Mass Mutual Life Insurance Company (“defendant”) filed a notice of non-opposition (ECF No. 59), to which plaintiff replied (ECF No. 66).

Also before the court is defendant’s motion for partial summary judgment. (ECF No. 54). Plaintiff filed a response (ECF No. 60), to which defendant replied (ECF No. 71).

Also before the court is defendant’s motion to strike the report of plaintiff’s expert witness. (ECF No. 63). Plaintiff filed a response, (ECF No. 72), to which defendant replied while awaiting adjudication of its motion for leave to file that reply (ECF No. 77).

Also before the court are defendant’s motions to extend time to file a reply or, in the alternative, for leave to file a reply to its motion to strike. (ECF Nos. 73–74). Plaintiff filed a response (ECF No. 75), to which defendant replied (ECF No. 76).

**I. Background**

This action is an insurance dispute arising from a slip and fall incident at the Miracle Mile Shops in Las Vegas. Plaintiff, a pain management physician, slipped and fell at the shops

1 on August 25, 2012. (ECF No. 1-1 at 4). At the time of her fall, she had an insurance policy  
 2 with defendant. That policy required defendant to pay total disability benefits if the insured  
 3 could not perform the primary duties of her occupation due to injury. (*Id.*) The policy also  
 4 limited payments to 24 months for any disability “caused or contributed to by a Mental  
 5 Disorder.” (ECF No. 54-1 at 16).

6 Following her fall, plaintiff was diagnosed with several spinal injuries, which allegedly  
 7 have caused her continuing pain and cognitive impairment. (ECF No. 1-1 at 5). In early 2016,  
 8 plaintiff filed a disability claim with defendant. (*Id.* at 6). Plaintiff provided medical records  
 9 that purported to show that she was “totally disabled” under the policy. (*Id.* at 3). Defendant  
 10 disagreed with that characterization and conducted its own investigation of her alleged disability,  
 11 but conditionally approved the claim on October 27, 2016. (*Id.* at 9–10). Throughout its  
 12 investigation, defendant paid benefits to plaintiff under a “reservation of rights.” (*Id.* at 10).

13 Based on its review of plaintiff’s medical records and consultation with its retained  
 14 medical professionals, defendant eventually determined that plaintiff’s injuries were the result of  
 15 a mental disorder under the policy. (*Id.* at 12). Thus, on December 14, 2019, defendant  
 16 informed plaintiff that it would be discontinuing payment of benefits under the mental disorder  
 17 limitation. (*Id.*)

18 Plaintiff now brings this action for compensatory and punitive damages asserting that  
 19 defendant breached its insurance contract, contravened the implied covenant of good faith and  
 20 fair dealing, and violated Nevada Revised Statute § 686A.310. (*Id.* at 13–15). Defendant has  
 21 moved for summary judgment on the claims for violation of the implied covenant of good faith  
 22 and fair dealing and NRS § 686A.310. (ECF No. 54). Defendant also moves for summary  
 23 judgment as to punitive damages and as to the burden of proof on the plaintiff’s breach of  
 24 contract claim. (*Id.*)

## 25 **II. Legal Standard**

### 26 A. Motions in limine

27 “The court must decide any preliminary question about whether . . . evidence is  
 28 admissible.” Fed. R. Evid. 104. Motions in limine are procedural mechanisms by which the

1 court can make evidentiary rulings in advance of trial, often to preclude the use of unfairly  
 2 prejudicial evidence. *United States v. Heller*, 551 F.3d 1108, 1111–12 (9th Cir. 2009); *Brodit v.*  
 3 *Cambra*, 350 F.3d 985, 1004–05 (9th Cir. 2003).

4 “Although the Federal Rules of Evidence do not explicitly authorize in limine rulings, the  
 5 practice has developed pursuant to the district court’s inherent authority to manage the course of  
 6 trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1980). Motions in limine may be used to  
 7 exclude or admit evidence in advance of trial. *See* Fed. R. Evid. 103; *United States v. Williams*,  
 8 939 F.2d 721, 723 (9th Cir. 1991) (affirming district court’s ruling in limine that prosecution  
 9 could admit impeachment evidence under Federal Rule of Evidence 609).

10 Judges have broad discretion when ruling on motions in limine. *See Jenkins v. Chrysler*  
 11 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); *see also Trevino v. Gates*, 99 F.3d 911, 922  
 12 (9th Cir. 1999) (“The district court has considerable latitude in performing a Rule 403 balancing  
 13 test and we will uphold its decision absent clear abuse of discretion.”). “[I]n limine rulings are  
 14 not binding on the trial judge [who] may always change his mind during the course of a trial.”  
 15 *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *accord Luce*, 469 U.S. at 41 (noting that *in*  
 16 *limine* rulings are always subject to change, especially if the evidence unfolds in an unanticipated  
 17 manner).

18 “Denial of a motion in limine does not necessarily mean that all evidence contemplated  
 19 by the motion will be admitted [or excluded] at trial. Denial merely means that without the  
 20 context of trial, the court is unable to determine whether the evidence in question should be  
 21 excluded.” *Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-1649-JCM-CWH, 2013 WL 1701069,  
 22 at \*1 (D. Nev. Apr. 18, 2013).

### 23 B. Motion for Summary Judgment

24 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
 25 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
 26 any, show that “there is no genuine dispute as to any material fact and the movant is entitled to  
 27 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment  
 28

1 is “to isolate and dispose of factually unsupported claims . . . .” *Celotex Corp. v. Catrett*, 477  
2 U.S. 317, 323–24 (1986).

3 For purposes of summary judgment, disputed factual issues should be construed in favor  
4 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to  
5 be entitled to a denial of summary judgment, the non-moving party must “set forth specific facts  
6 showing that there is a genuine issue for trial.” *Id.*

7 In determining summary judgment, the court applies a burden-shifting analysis. “When  
8 the party moving for summary judgment would bear the burden of proof at trial, it must come  
9 forward with evidence which would entitle it to a directed verdict if the evidence went  
10 uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480  
11 (9th Cir. 2000). Moreover, “[i]n such a case, the moving party has the initial burden of  
12 establishing the absence of a genuine issue of fact on each issue material to its case.” *Id.*

13 By contrast, when the non-moving party bears the burden of proving the claim or  
14 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
15 an essential element of the non-moving party’s case; or (2) by demonstrating that the non-  
16 moving party failed to make a showing sufficient to establish an element essential to that party’s  
17 case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at  
18 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied  
19 and the court need not consider the non-moving party’s evidence. *See Adickes v. S.H. Kress &*  
20 *Co.*, 398 U.S. 144, 159–60 (1970).

21 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
22 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
23 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
24 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
25 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
26 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,  
27 809 F.2d 626, 630 (9th Cir. 1987).

28

1 In other words, the nonmoving party cannot avoid summary judgment by relying solely  
 2 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d  
 3 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and  
 4 allegations of the pleadings and set forth specific facts by producing competent evidence that  
 5 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

6 At summary judgment, a court's function is not to weigh the evidence and determine the  
 7 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*  
 8 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all  
 9 justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the  
 10 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
 11 granted. *See id.* at 249–50.

12 The Ninth Circuit has held that information contained in an inadmissible form may still  
 13 be considered for summary judgment if the information itself would be admissible at trial.  
 14 *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253  
 15 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily  
 16 have to produce evidence in a form that would be admissible at trial, as long as the party satisfies  
 17 the requirements of Federal Rules of Civil Procedure 56.")).

### 18 **III. Discussion**

19 As an initial matter, the court grants plaintiff's motion for partial summary judgment as  
 20 to defendant's twelfth affirmative defense. (ECF No. 49). As defendant concedes in its non-  
 21 opposition, there is insufficient evidence to conclude plaintiff's policy was subject to ERISA.  
 22 *See* (ECF No. 59).

23 Further, the court denies defendant's motion for an extension of time to file a reply to its  
 24 motion to strike (ECF No. 73) and its alternative motion for leave to file that reply (ECF No. 74).  
 25 Although captioned as a motion to strike, the court treats defendant's initial motion as a motion  
 26 in limine. The motion to strike seeks an evidentiary ruling excluding testimony from plaintiff's  
 27 purported expert witness. *See Heller*, 551 F.3d at 1111–1112 ("A motion in limine is a  
 28 procedural mechanism to limit in advance testimony or evidence in a particular area.")

1 Defendant cannot circumvent this district’s local rules by mischaracterizing its motion,  
 2 especially since it filed the instant motion with a LR 16-3(a) certification as is required of a  
 3 motion in limine. *See, e.g., Lemperle v. Avis Rent-A-Car Syst.*, No. 2:18-CV-202-JCM-DJA,  
 4 2020 WL 13517875 (D. Nev. Jan. 2, 2020). A reply to a motion in limine is not permitted  
 5 without leave of court, and defendant makes no argument as to why the court should permit a  
 6 reply. Defendant’s proposed reply (ECF No. 77) is STIRCKEN from the record, and the court  
 7 will not consider any arguments contained within.

8 A. Terry Van Noy

9 Federal Rule of Evidence 702 provides that a witness qualified as an expert may testify if  
 10 “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to  
 11 understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient  
 12 facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the  
 13 expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid.  
 14 702.

15 In determining whether an expert’s testimony is reliable under Rule 702, courts consider  
 16 “(a) whether the theory or technique can and has been tested; (b) whether the theory or technique  
 17 has been subjected to peer review and publication; (c) the known or potential rate of error for the  
 18 technique; and (d) the theory or technique’s general degree of acceptance in the relevant  
 19 scientific community. *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 945 (9th Cir. 2009)  
 20 (citing *Daubert v. Merrel Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)).

21 District judges retain “broad latitude to determine” whether these factors reasonably  
 22 measure the reliability of an expert witness’s testimony. *Estate of Barabin v. AstenJohnson, Inc.*,  
 23 740 F.3d 457, 463 (9th Cir. 2014) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150  
 24 (1999)). “*Daubert*’s general holding—setting forth the trial judge’s general ‘gatekeeping’  
 25 obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony  
 26 based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co. v. Carmichael*, 526  
 27 U.S. 137, 141 (1999). This “gatekeeping obligation” requires “that all admitted expert testimony  
 28 is both relevant and reliable.” *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir.

2017). Expert testimony must be relevant and reliable, and it must “relate to scientific, technical, or other specialized knowledge, which does not include unsupported speculation and subjective beliefs.” *Guidroz–Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001).

Exclusion of expert testimony is proper only when such testimony is irrelevant or unreliable because “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 596 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

Defendant asserts that the expert report of plaintiff’s purported insurance expert, Terry Van Noy, must be stricken because (1) he is not qualified as an expert on insurance claims handling, (2) his testimony is not based on reliable methodology, and (3) he relies on personal opinion and makes impermissible conclusions of law. *See* (ECF No. 63).

#### 1. *Qualifications*

FRE 702 requires a testifying expert be “qualified by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. Rule 702 “contemplates a broad conception of expert qualifications.” *Thomas v. Newton Int’l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994).

Van Noy has 51 years of experience in the insurance industry. (ECF No. 60-6 at 892). He has managed claim departments and developed policies to handle life, dental, disability, and health insurance claims. (*Id.*) He states that he has personally investigated claims. (*Id.*)

“This lays at least the minimal foundation of knowledge, skill, and experience required in order to give ‘expert’ testimony on the practices and norms of insurance companies in the context of a bad faith claim.” *Thomas*, 43 F.3d at 1269. The Ninth Circuit has ratified a district court’s decision to allow an insurance expert to testify in a similar case when the proffered expert had a similar resume to Van Noy. *See Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (finding that 25 years’ experience evaluating claims, marketing insurance products, and evaluating insurance policies sufficiently qualified an expert witness to testify as to a bad faith claim).



Further, defendant's argument that Van Noy is giving a medical opinion that he is unqualified to deliver is unpersuasive. What Van Noy has done is no different than what defendant's own claim handlers did. Defendant's claim handlers determined that the facts showed plaintiff was not disabled. *See, e.g.*, (ECF No. 54-54). Van Noy, looking at the same facts, came to the opposite conclusion. A party cannot exclude an expert witness's testimony simply because that expert came to an unfavorable conclusion. Van Noy is qualified as an insurance claims handling expert.

## 2. Reliability

Defendant also argues that Van Noy's testimony must be excluded because it is not the product of a reliable methodology.

An expert's testimony must be based on "sufficient facts or data," and must be the product of reliable principle or methods that are applied to the facts of the case. Fed. R. Evid. 702. In the case of non-scientific testimony, the traditional *Daubert* factors are less pertinent. *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). Instead, "the knowledge and experience of the expert, rather than the methodology or theory behind" the testimony is most relevant. *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002).

Defendant criticizes Van Noy's report as "bereft of explanation" and reliant "on unsupported opinions disguised as 'facts.'" (ECF No. 63 at 17–18). As mentioned above, Van Noy has over fifty years of experience in the insurance industry, primarily as an executive and consultant for claims handling departments. (ECF No. 60-6 at 892). He has articulated a list of ten standards and relied on the facts contained in at least thirty-nine different documents to form his opinions. (*Id.* at 899, 906). His report synthesizes his opinions based on an application of those ten standards to the facts of the case. Defendant may disagree with Van Noy's conclusions, but that disagreement does not go to the testimony's reliability; it goes to its credibility, which is for a jury to determine. Based on the foregoing, the court finds that his testimony is reliable.

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...



1                                   3. *Ultimate Issue*

2           Defendant also asserts that Van Noy's report must be excluded because it improperly  
3 reaches legal conclusions.

4           An expert witness may properly embrace an ultimate issue to be decided by the eventual  
5 factfinder. Fed. R. Evid. 704(a). That testimony may also refer to the law, so long as it does not  
6 make an ultimate conclusion or instruct the jury on the applicable law. *See Hangarter*, 373 F.3d  
7 at 1016–17.

8           In his expert report, Van Noy refers to defendant's actions as unreasonable in at least six  
9 of his twelve "opinions." (ECF No. 60-6 at 900–02). The heart of plaintiff's claims,  
10 particularly her claim for breach of the implied covenant of good faith and fair dealing, is  
11 whether defendant acted reasonably when it denied her coverage. *See Falline v. GNLV Corp.*,  
12 823 P.2d 888, 891 (Nev. 1991).

13           While Van Noy may be qualified and his testimony is reliable, his conclusions read as a  
14 court's opinion, not an expert report. He usurps the role of the court and the jury in making  
15 ultimate conclusions of law. This is not a case where Van Noy makes passing mention of the  
16 law as a means to reach his conclusions. *See Hangarter*, 373 F.3d at 1017. Because the opinions  
17 expressed in Van Noy's expert report are nearly all legal conclusions, defendant's motion to  
18 strike that report is granted.

19                               B. Summary Judgment

20           Defendant moves for summary judgment on plaintiff's claims for bad faith, breach of the  
21 Nevada Unfair Claims Settlement Practices Act, and punitive damages. (ECF No. 54 at 2). It  
22 also seeks a holding that plaintiff must prove she is physically disabled due to a physical  
23 condition to prevail on her breach of contract claim. (*Id.*).

24                               1. Bad Faith

25           In order to prevail on a bad-faith claim, plaintiffs must show "the absence of a reasonable  
26 basis for denying benefits and the defendant's knowledge or reckless disregard of the lack of a  
27 reasonable basis for denying the claim." *Falline*, 823 P.2d at 891 (quotation marks, ellipses, and  
28 citation omitted).

1 Because bad faith requires the defendant to be objectively and subjectively unreasonable,  
2 the genuine dispute doctrine provides that “the insurer is not liable for bad faith for being  
3 incorrect about policy coverage as long as the insurer had a reasonable basis to take the position  
4 that it did.” *Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1242 (D.  
5 Nev. 1994) (citing *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1355 (Nev.  
6 1986)). The Ninth Circuit has unambiguously held that, “because the key to a bad faith claim is  
7 whether denial of a claim was reasonable, a bad faith claim should be dismissed *on summary*  
8 *judgment* if the defendant demonstrates that there was ‘a genuine dispute as to coverage.’”  
9 *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003) (emphasis added).

10 As explained above, Terry Van Noy’s expert report is made up of conclusions of law;  
11 thus, this court has stricken it and will not consider the evidence contained within.

12 Plaintiff argues that defendant acted in bad faith when it subjected her claim to the mental  
13 disability limitation. See (ECF No. 60 at 19). She claims that defendant disregarded evidence  
14 and looked for reasons to deny her claim. (*Id.*) Not so. Plaintiff cites to no evidence indicating  
15 that defendant tried to find a way to deny her claim. Indeed, defendant paid benefits and  
16 continued to investigate her claim while looking for evidence corroborating her claim of total  
17 physical disability while being clear that it was “reserving its rights” to discontinue payment  
18 based on the results of that investigation. (ECF No. 1-1 at 10).

19 Likewise, the fact that defendant came to a different conclusion than plaintiff’s doctors  
20 does not mean that defendant “failed to consider” plaintiff’s evidence; it means that it interpreted  
21 the evidence differently. Specifically, plaintiff points to statements by Dr. Mortillaro and claims  
22 that defendant failed to give them adequate consideration, even though Dr. Mortillaro indicated  
23 that plaintiff’s “clinical presentation was consistent with the diagnosis of a Somatic Symptom  
24 Disorder.” See (ECF No. 54-22).

25 Defendant’s consulting physicians considered Dr. Mortillaro’s opinions. (ECF Nos. 54-  
26 36; 54-41). Similarly, defendant’s consulting physicians reviewed the records of plaintiff’s  
27 treatment with every other physician, including Drs. Kidwell, Thompson, Travnicek, and Nagy.  
28 (ECF Nos. 54-35; 54-36; 54-37; 54-41; 54-47). Plaintiff may disagree with defendant’s

1 conclusion, but there is no evidence that she can fault defendant's process. Defendant did not  
2 disregard evidence of plaintiff's purported disability.

3 Furthermore, there is no evidence that defendant looked for reasons to deny plaintiff's  
4 claim. Defendant had evidence from Dr. Klein and Dr. Cestkowski from as early as 2016 that  
5 plaintiff did not suffer head trauma and her disability did not result from physical injury. (ECF  
6 Nos. 54-6; 54-7). Defendant, nevertheless, continued to pay out plaintiff's claim, which is  
7 inconsistent with an argument that it was looking for reasons to subject the claim to the mental  
8 disorder limitation. *See* (ECF No. 54-18). Requests for more information to corroborate a  
9 disability claim do not equate to an attempt to limit benefits. *See Meek v. Standard Ins. Co.*, 47  
10 Fed. App'x 37, 38 (9th Cir. 2002).

11 It may be that defendant incorrectly subjected plaintiff's claim to the mental disability  
12 limitation. Indeed, that is the heart of plaintiff's breach of contract claim. That does not mean  
13 defendant acted unreasonably in its limitation of benefits, however, which is what plaintiff's bad  
14 faith claim alleges. There is no genuine issue of material fact—defendant acted reasonably when  
15 it subjected plaintiff's claim to the mental disability limitation after a four-year investigation that  
16 considered plaintiff's evidence. The court grants defendant's motion for summary judgment as  
17 to plaintiff's claim for breach of the covenant of good faith and fair dealing.

## 18 2. Nevada Unfair Claim Settlement Practices Act

19 The Nevada Unfair Claims Settlement Practices Act ("UCSPA"), codified at Section  
20 686A.310 of the Nevada Revised Statutes, addresses "the manner in which an insurer handles an  
21 insured's claim." *Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1236 (D.  
22 Nev. 2010). The statute lists sixteen activities that constitute unfair practices. Nev. Rev. Stat. §  
23 686A.310(1)(a)-(p). When an insurance company engages in one of these prohibited activities,  
24 the insured may bring a private right of action against the insurer for violations of the statute.  
25 *See Hart v. Prudential Prop. & Cas. Ins. Co.*, 848 F.Supp. 900, 903 (D. Nev. 1994).

26 Plaintiff's complaint alleges four independent violations of the UCSPA. She alleges that  
27 defendant (1) unfairly denied her claim when coverage under the policy was reasonably clear; (2)  
28

1 misrepresented pertinent facts; (3) failed to adopt and implement reasonable claims investigation  
2 standards; and (4) compelled her to initiate litigation to obtain benefits. (ECF No. 1-1 at 15).

3 As discussed above, coverage under the policy was not clear; defendant had reasonable  
4 grounds to deny her claim. Similarly, defendant could not have compelled plaintiff to initiate  
5 litigation when it gave plaintiff an opportunity to appeal its decision with a new claim examiner.  
6 (ECF No. 1-1 at 12).

7 As to the allegations that the claim investigation standards were unreasonable, plaintiff's  
8 argument is unclear. The central contention, however, is that because the investigation took four  
9 years, it was neither prompt, nor reasonable. Plaintiff mischaracterizes the record. Defendant  
10 made a coverage decision approving the claim under a reservation of rights on October 31, 2016.  
11 (ECF No. 54-18 at 2). Defendant made this determination within thirty days of the conversation  
12 between Drs. Klein and Nagy, which was necessary for evaluation of the claim. (*See* ECF Nos.  
13 54-14; 54-15). Defendant made a coverage decision within a reasonable time. It is not liable  
14 under NRS § 686A.310(d).

15 Plaintiff's final argument under the UCSPA is that defendant misrepresented pertinent  
16 facts regarding her coverage, including that (1) she had a mental disorder; (2) her physicians  
17 supported that diagnosis; and (3) her claim was subject to ERISA. (ECF No. 60 at 24). None of  
18 these arguments are availing.

19 Plaintiff's argument is, at bottom, that defendant incorrectly determined the mental  
20 disorder limitation applied, and misrepresented facts in its journey to reach that determination.  
21 Even assuming defendant incorrectly applied its policy provisions, an incorrect determination is  
22 not the same as an affirmative misrepresentation, which is what is required of the UCSPA. *See*  
23 *Albert H. Wohlers & Co. v. Bartgis*, 969 P.2d 949, 961 (Nev. 1998).

24 Plaintiff summarily concludes that defendant concealed information about its  
25 investigation, misrepresented the nature of the mental disorder limitation, and subjected her  
26 claim to ERISA. *See* (ECF No. 60 at 24). These unsubstantiated conclusions are insufficient to  
27 generate a dispute of material fact. Plaintiff provides no evidence that defendant concealed  
28 information or misrepresented the scope of the limitation. Similarly, while she alleges, and

1 defendant concedes, that it misapplied ERISA guidelines to the claim, plaintiff never explains  
 2 how application of ERISA claims handling procedures is a misrepresentation of her policy. *See*  
 3 (*Id.*; ECF No. 59)

4 The court grants summary judgment to defendant on plaintiff's claim for violation of  
 5 NRS § 686A.310.

### 6 3. Punitive Damages

7 Defendant also moves for summary judgment on plaintiff's claim for punitive damages.  
 8 Plaintiff alleges that defendant acted with "fraud, malice, and oppression" when it denied her  
 9 claim, and thus she is entitled to punitive damages. (ECF No. 1-1 at 16).

10 Once again, the court has already determined that defendant's conduct was reasonable.  
 11 Therefore, defendant lacked the requisite state of mind to have acted fraudulently, maliciously,  
 12 or oppressively, all of which require specific intent. *See Ainsworth v. Combined Ins. Co.*, 763  
 13 P.2d 673, 675 (1988); *Pioneer*, 863 F. Supp. at 1251.

14 Defendant determined, after a thorough investigation, that plaintiff was not entitled to  
 15 benefits. *See* (ECF No 54-55). Defendant apprised her of its investigation at all steps. *See* (ECF  
 16 Nos. 54-27; 54-28; 54-29). The fact that it came to a conclusion that plaintiff found  
 17 unsatisfactory does not support an accusation of fraud, malice, or oppression. The court grants  
 18 summary judgment to defendant on plaintiff's claim for punitive damages.

### 19 4. Breach of Contract

20 Finally, defendant moves for summary judgment requiring plaintiff to prove that she was  
 21 actually disabled to prevail on her breach of contract claim.

22 As plaintiff states, the policy requires defendant to pay benefits if the insured is "Totally  
 23 Disabled" in that she cannot perform the main duties of her occupation. *See* (ECF No. 54-1 at  
 24 12). Plaintiff argues that she has established her total disability and it is now defendant's  
 25 responsibility to rebut that evidence. *See* (ECF No. 60 at 28). That argument is presumptive,  
 26 however. It is premised on the assumption that plaintiff has proven her disability under the  
 27 policy, which she has not. Defendant never conclusively determined that she was totally  
 28 disabled. *See* (ECF No. 54-19). Thus, for relief under a breach of contract theory, plaintiff must

1 prove she was physically disabled and thus entitled to an initial determination that coverage  
2 applied.

3 Under the facts at issue, the breach would not be that defendant applied the mental  
4 disorder limitation; it would be that defendant incorrectly determined plaintiff was not totally  
5 disabled. Therefore, to substantiate that claim, plaintiff must prove that she *was* totally disabled  
6 such that the mental disorder limitation does not apply. The court grants defendant's summary  
7 judgment motion as to the burden of proof on plaintiff's breach of contract claim. To prevail on  
8 her breach of contract claim, plaintiff bears the burden of proving she was totally disabled.

9 **IV. Conclusion**

10 Accordingly,

11 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for  
12 partial summary judgment (ECF No. 49) be, and the same hereby is, GRANTED.

13 IT IS FURTHER ORDERED that defendant's motion to extend time to file a reply (ECF  
14 No. 73) be, and the same hereby is, DENIED.

15 IT IS FURTHER ORDERED that defendant's motion for leave to file a reply (ECF No.  
16 74) be, and the same hereby is, DENIED.

17 IT IS FURTHER ORDERED that defendant's motion to strike (ECF No. 63) be, and the  
18 same hereby is, DENIED.

19 IT IS FURTHER ORDERED that defendant's motion for partial summary judgment  
20 (ECF No. 54) be, and the same hereby is, GRANTED.

21 DATED September 15, 2022.

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23 UNITED STATES DISTRICT JUDGE  
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